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on Trade and Development**

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TRADE AND DEVELOPMENT BOARD
Intergovernmental Group of Experts
on Restrictive Business Practices
Ninth session
Geneva, 23 April 1990
Item 2 of the provisional agenda

ADOPTION OF THE AGENDA AND ORGANIZATION OF WORK

Provisional agenda and annotations

1. Election of officers
2. Adoption of the agenda and organization of work
3. Preparations for the United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices:
 - (a) Review of ten years of application and implementation of the Set;
 - (b) Formulation of proposals for the improvement and further development of the Set of Principles and Rules;
 - (c) Provisional agenda for the Conference;
 - (d) Provisional rules of procedure for the Conference
4. Other business
5. Adoption of the report of the Intergovernmental Group of Experts.

GE: 90-50103

II. ANNOTATIONS TO THE PROVISIONAL AGENDA

Item 1: Election of officers

The Intergovernmental Group of Experts, from its first to its eighth sessions, agreed to conduct its work at those sessions in accordance with the rules of procedure of the main Committees of the Trade and Development Board^{1/}. In consequence, the Group elected a Bureau, composed of a Chairman, five Vice-Chairmen and a Rapporteur, following the seven-session cycle of rotation for office bearers of the Committee on Manufactures. Should the Group decide to continue at its ninth session to operate on the same basis, the Chairman for the ninth session would be elected from Group B and the Rapporteur from Group C (Latin America). Three Vice-Chairmen would be elected from Group A (Asia and Africa), one from Group B and one from Group D.

Item 2: Adoption of the agenda and organization of work

The General Assembly, in its resolution 41/167, decided to convene, in 1990, under the auspices of UNCTAD, a United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and also decided that the Intergovernmental Group of Experts on Restrictive Business Practices, at its annual session in 1990, shall serve as the preparatory body for that Conference. Accordingly, the Intergovernmental Group of Experts, at its eighth session, approved the draft provisional agenda for its ninth session, as contained in annex II of the Report of the Intergovernmental Group on its eighth session.^{2/}

Concerning the organization of the work of the ninth session, the Group has five working days available. It is suggested that the first meeting, on 23 April, be devoted to procedural matters (items 1 and 2) and to introductory statements. The last meeting, on 27 April, would be devoted to item 4 (other business) and item 5 (adoption of the report of the Intergovernmental Group of Experts). The afternoon of Thursday 26 April would need to be kept free for the preparation of the draft report. The remaining meetings (i.e. from 24 April to the morning of 26 April) would be devoted to the substantive items on the agenda (items 3(a) (b) (c) and (d)).

^{1/} The Rules of Procedure of the main Committees are contained in TD/B/740 (United Nations publication, Sales No.F.79.II.D.3). It should be noted, however, that the Trade and Development Board, at its thirty-fifth session, second part, decided "with respect to the application of the rules of procedure of the main Committees by the Intergovernmental Group of Experts on Restrictive Business Practices, to accord intergovernmental organizations which have competence in the area of restrictive business practices the same participation rights as those accorded to States except for the right of vote". (Decision 366 (XXXV) of 15 March 1989.)

^{2/} TD/B/1236-TD/B/RBP/67.

Item 3: Preparations for the United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices:

- (a) Review of ten years of application and implementation of the Set;
- (b) Formulation of proposals for the improvement and further development of the Set of Principles and Rules

In view of the very close relationship between these two sub-items, it is proposed that they be considered together. To assist the Intergovernmental Group of Experts at its ninth session in preparation for the review of all aspects of the Set, including making possible proposals for the 1990 Review Conference, the Group at its eighth session requested the UNCTAD secretariat to prepare the necessary documentation, including:

- (a) An overview of the existing possibilities of supplying, obtaining and making available information on restrictive business practices adversely affecting international trade, in particular the trade and development of developing countries, and of effectively using consultation procedures as provided for in section F, paragraph 4, of the Set, taking into account the views expressed during the seventh and eighth sessions of the Group, with a view to contributing to the implementation of the agreement reached under paragraph 105(18) of the Final Act of UNCTAD VII: and
- (b) An assessment of the application and implementation of the Set in the ten-year period of the Set's operations.

Accordingly, the Intergovernmental Group, at its ninth session, will have before it a note by the UNCTAD secretariat (TD/B/RBP/69), containing a broad assessment of the application and implementation of the Set in the ten years since its adoption; an overview of the existing possibilities of supplying, obtaining and making available information on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries; and an analysis of the consultation procedures as provided for in section F, paragraph 4, of the Set and of the possibilities of making use of such provisions. Replies, if any, to the Secretary-General's note of 11 January 1990 inviting States members to inform the UNCTAD secretariat of any proposals they might wish to make for improving or further developing the Set, will be reproduced as an addendum to that document. States have been invited to submit their proposals to the secretariat no later than 15 March 1990 in order to enable them to be circulated in time to all regional groups and processed for general distribution.

- (c) Provisional agenda for the Conference
The UNCTAD secretariat will submit a draft provisional agenda for the Review Conference.
- (d) Provisional rules of procedure for the Conference
Draft provisional rules of procedure, prepared by the UNCTAD secretariat, will be before the Group in TD/B/RBP/70.

Item 4: Other business

Item 5: Adoption of the report of the Intergovernmental Group of Experts

Trade and Development Board resolution 228 (XXII) provides that the Group shall submit reports on its work at least once a year to the Board, through the Committee on Manufactures, when practicable and appropriate, and otherwise directly to the Board. Accordingly, the report of the ninth session will be submitted to the Trade and Development Board at the first part of its thirty-seventh session.

In accordance with General Assembly resolution 41/167, the report of the ninth session and the proposals for improvement and further development of the Set will be submitted to the United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, scheduled to take place from 26 November to 7 December 1990.



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on Trade and Development**

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TRADE AND DEVELOPMENT BOARD
Intergovernmental Group of Experts on
Restrictive Business Practices
Ninth session
Geneva, 23 April 1990
Item 3 of the provisional agenda

**PREPARATIONS FOR THE UNITED NATIONS CONFERENCE TO REVIEW ALL
ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES
AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES**

- A. REVIEW OF TEN YEARS OF APPLICATION AND
IMPLEMENTATION OF THE SET**
- B. FORMULATION OF PROPOSALS FOR THE IMPROVEMENT
AND FURTHER DEVELOPMENT OF THE SET OF
PRINCIPLES AND RULES**

Comprehensive review of the implementation of the Set

Note by the UNCTAD secretariat

<u>Chapter</u>	<u>CONTENTS</u>	<u>Paragraphs</u>
	INTRODUCTION	1 - 6
I.	ASSESSMENT OF THE APPLICATION AND IMPLEMENTATION OF THE SET IN THE TEN YEARS SINCE ITS ADOPTION	7 - 60
	Section A - Objectives	7 - 20
	Section B - Definitions and scope of application	21 - 28
	(i) Definitions	21
	(ii) Scope of application	22 - 28
	All transactions in goods and services	23
	State-owned enterprises	24
	Regional groupings of States	25
	Exemption of intergovernmental agreements from the scope of application of the Set	26 - 28
	Section C - Multilaterally agreed equitable principles for the control of..... restrictive business practices	29 - 34
	(i) General principles	29
	(ii) Relevant factors	30 - 31
	(iii) Preferential or differential treatment for developing countries	32 - 34
	Section D - Principles and rules for enterprises, including transnational corporations	35 - 46
	Intra-firm transactions of transnational corporations	38
	Enterprises engaged on the market in rival or potentially rival activities	39 - 43
	Enterprises in an abuse, or acquisition and abuse of a dominant position of market power	44 - 46
	Section E - Principles and rules for States at national, regional and subregional levels ...	47 - 52
	Section F - International measures	53 - 57
	Model law or laws, and technical assistance	54 - 57
	Section G - International institutional machinery	58 - 60
	(i) Institutional arrangements	58
	(ii) Functions of the Intergovernmental Group	59
	(iii) Review procedure	60
II.	OVERVIEW OF THE EXISTING POSSIBILITIES OF SUPPLYING, OBTAINING AND MAKING AVAILABLE INFORMATION ON RBPS ADVERSELY AFFECTING INTERNATIONAL TRADE	61 - 71
	Appropriate mechanisms for the exchange and dissemination of information among Governments	62 - 71
III.	ANALYSIS OF THE CONSULTATION PROCEDURE, AND OF THE POSSIBILITIES TO MAKE USE OF SUCH PROVISIONS	72 - 85
IV.	CONCLUSIONS AND PROPOSALS FOR ACTION	86 - 91

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INTRODUCTION

1. The General Assembly, in its resolution 41/167, decided to convene, in 1990, under the auspices of the United Nations Conference on Trade and Development, a United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.¹ In the same resolution, the General Assembly decided that the Intergovernmental Group of Experts on Restrictive Business Practices, at its annual session in 1990, should serve as the preparatory body for that Conference.

2. At its eighth session, from 23 to 27 October 1989, the Intergovernmental Group of Experts on Restrictive Business Practices, in its agreed decisions and conclusions,² requested the UNCTAD secretariat, in order to assist the Group at its ninth session in preparing for the review of all aspects of the Set, including making possible proposals for the 1990 Review Conference, to prepare the necessary documentation, including:

- (a) An overview of the existing possibilities of supplying, obtaining and making available information on restrictive business practices adversely affecting international trade, in particular the trade and development of developing countries, and of effectively using consultation procedures as provided for in section F, paragraph 4, of the Set, taking into account the views expressed during the seventh and eighth sessions of the Group, with a view to contributing to the implementation of the agreement reached under paragraph 105(18) of the Final Act of UNCTAD VII; and
- (b) An assessment of the application and implementation of the Set in the ten-year period of the Set's operation.

3. Accordingly, the present note is divided into three parts, and a concluding section. Chapter I contains a broad assessment of the application and implementation of the Set in the ten years since its adoption, with a view to analysing, where appropriate, those provisions of the Set which have not been satisfactorily implemented, and to bringing forward proposals for improvement or further development of the Set, in order to facilitate its effective application.

4. Chapter II examines the existing possibilities of supplying, obtaining and making available information on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, with a view to drawing attention to the areas where further progress should be sought in the short or longer term.

5. Chapter III analyses the consultation procedures, as provided in section F, paragraph 4, of the Set and the possibilities to effectively use such provisions in resolving issues concerning the control of restrictive business practices, in the light of views expressed during the seventh and eighth sessions of the Group.

6. The concluding section contains a list of possible proposals to be discussed during the ninth session of the Intergovernmental Group of Experts.

¹ The Set, as adopted in General Assembly, resolution 35/63 of 5 December 1980, is contained in document TD/RBP/CONF/10 Rev.1.

² Annex I to the Report of the eighth session (TD/B/1236; RD/B/RBP/67).

Chapter I

ASSESSMENT OF THE APPLICATION AND IMPLEMENTATION OF THE SET, IN THE TEN YEARS SINCE ITS ADOPTION

Section A - Objectives

7. The practical results of the Set, almost ten years after its adoption and shortly before the second Review Conference, are perceived in various ways. Disappointment is expressed most clearly by the developing countries, also by China and Eastern European countries, while the developed market-economy countries in general and on balance are more satisfied with the implementation of the Set.

8. Clearly, objectives No.1 and 4 of the Set, namely:

"1. To ensure that RBPs do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;"

and

"4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;"

have not been met. Concern has been expressed repeatedly by the IGE at its annual sessions, "*at the continued existence of restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries*".

9. While it is evident that in ten years of application of the Set, it cannot be expected that RBPs could be completely eliminated from world trade, the question is rather that of evaluating whether there has been an increase or a reduction in the use of RBPs by enterprises. On this, views are diametrically opposed - between the developed market-economy countries on the one hand, and the developing countries, Eastern European countries and China on the other.

10. There are many reasons for these divergences of views. The *first*, is a technical reason: by their very nature, RBPs are difficult to quantify and to evaluate in comparable statistical data. Being secret by nature, a large proportion of such practices escape any control and thus never appear in collected data. Moreover, an increase in the number of cases reported does not necessarily indicate an increase in RBPs, since a higher number of cases reported might simply result from stricter application of RBP control legislation. Conversely, a reduction in RBP cases reported might reflect a more lenient, or less active, attitude of the RBP control authorities rather than a reduction in the number of cases.

11. In the same line of thought, it should be noted that certain States have a higher degree of transparency than others and therefore information supplied by them might bring to light more RBP cases than in other countries, whereas a State transmitting no, or less, information may be one in which more RBPs do take place. Therefore, the fact that very few or even no cases are reported in certain countries or regions does not automatically imply that RBPs do not occur in those countries or regions. It can be safely assumed that enterprises which do not abstain from using RBPs even in countries having RBP legislation and where severe corrective action exists - such as in many developed countries - will certainly not refrain from indulging in such practices in those regions or countries where RBP controls do not exist, or are very weak.

12. *Secondly*, in domestic markets where the process of deregulation - i.e. the dismantling of

State monopolies or State-regulated sectors - has taken place, thus opening these markets to competitive forces, it has proved necessary to enforce RBP legislation to ensure that newly 'deregulated' sectors did become more competitive and did not simply result in private monopolies replacing State monopolies as a result of restructuring and concentration of market power. Similar safeguards for newly deregulated sectors at the international level do not exist at present. In other words, as domestic markets open to competitive forces of international trade, domestic legislation is often not sufficient to come to grips with practices originating from one side of a border and having adverse effects on the other.

13. *Thirdly*, as progress in GATT and other fora gradually reduces the impact of governmental barriers to trade such as tariffs and non-tariff barriers, enterprise-level restraints to trade, such as RBPs, become more prominent. The rise of so-called "grey-area" trade restraints during the last decade - such as voluntary export restraints and orderly marketing arrangements - is an indication that arrangements to share markets and fix prices between exporting and importing-country industries have, in many cases, received the explicit - or tacit - approval of Governments. Once enterprises have taken the habit of colluding in certain markets with explicit or tacit government approval, it is difficult for the same Governments to convince these enterprises to refrain from doing so with respect to third markets.

14. Concern about these developments was strongly expressed by the developing countries, Eastern European countries and China. The developing countries stated repeatedly that in their view "very little, if any, concrete action was being taken by States in compliance with the Set ..." and "that rarely did legislative and policy measures taken by developed countries take into account their commitment vis-à-vis the Set".³ On the contrary, significant measures were taken in contravention of the Set and more and more resort was taken to increasingly complex, subtle, diversified and difficult to detect RBPs in international trade.⁴ The Eastern European countries found that the Set had not been instrumental in impeding the persistent and every-growing resort to RBPs and that the use of such practices as an additional protectionist measure at the enterprise level did not only serve to foreclose national markets from foreign competition, but was also increasingly used as a method of penetrating foreign markets.⁵ China stated that "the implementation of the Set was a far cry from the objectives and requirements laid down in that instrument", that "enterprises in the developed countries increasingly resorted to RBPs in international trade", that some developed countries had adopted protectionist trade policies and thereby stimulated their enterprises to use RBPs.⁶

15. For developed market-economy countries, the most effective way to meet the obligations under the Set was to enact national RBP legislation and to enforce it effectively in conformity with section E.I of the Set.⁷ In their view, all their RBP laws were in conformity with the fundamental principles of the Set.⁸ New RBP legislation in conformity with section E.I of the Set had also been introduced by developing countries. On the other hand, there was no evidence for an increasing use of RBPs in international trade, or for a reduced commitment of developed countries to the Set, or a more lenient enforcement policy.⁹

16. In this respect, developments during the 1980s, and especially towards the end of the decade, give rise to a certain degree of optimism with respect to the implementation of objectives No.2, 3 and 5 of the Set, namely:

"2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:

(a) The creation, encouragement and protection of competition;

³ Report of the IGE on RBPs on its 7th session, TD B 1210; TD B RP 56, para.17 and Annex III, para.3.

⁴ *Ibid.*, paras.18 et seq. Annex III, para.1.

⁵ *Ibid.*, Annex III, para. 2.

⁶ *Ibid.*, paras.36 and 37.

⁷ *Ibid.*, Annex II, para.1.

⁸ *Ibid.*, para. 43.

⁹ *Ibid.*, paras.45 to 47.

- (b) Control of the concentration of capital and/or economic power;
- (c) Encouragement of innovation;

"3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;"

and

"To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels."

17. A number of factors have coincided during this decade and seem to be accelerating, to create, globally, a more competitive environment at domestic, regional and international trade levels. Starting in the early 1980s, the process of deregulation of previously regulated sectors, such as banking, insurance and transportation services, in countries like the United States and the United Kingdom, has gradually spread to most developed market-economy countries. Perhaps most spectacular in this respect has been the globalization of financial markets and stock exchanges, where the opening of local financial markets to international competition has become a *sine qua non* of their survival.

18. With respect to international trade, it is to be hoped that the Uruguay Round will result in the opening of markets to competitive forces. Efforts in the area of services, moreover, might result in convincing Governments of the need to encourage competition domestically in order to be able to sustain competition at the international level.

19. Another important factor in favour of competition is the widespread changes taking place in Eastern European countries, where the gradual introduction of market price-formation mechanisms and creation of a more competitive environment is taking place. Similar efforts to respect market prices result in the gradual dismantling of subsidies and price regulations in a growing number of developing countries, where the need to replace regulated prices by competitive price-formation is rapidly being recognized.

20. One of the consequences of this global shift towards more competitive structures at domestic, regional and global levels, is the growing interest worldwide for effective RBP control legislation. During the decade under review, most developed market-economy countries have revised and amended their domestic RBP control legislation, with the aim of improving its effectiveness. In addition, a growing number of developing countries, as well as some East European countries, have adopted similar legislation or are in the process of doing so. Demands for technical assistance, advisory and training programmes in line with the Set, paragraphs 6 and 7 of section F, have grown tremendously, and the response afforded by UNCTAD, individual States with experience in this field and other organizations, though still limited for financial reasons, has grown considerably in the last years of this decade.

Section B - Definitions and scope of application

(i) Definitions

21. During the period under review, the definitions of "restrictive business practices", "dominant position of market power" and "enterprises", as appear under provisions 1, 2 and 3 respectively, of section B (i) have not been challenged.

(ii) Scope of application

22. This section of the Set specifies that the Set applies to "all transactions in goods and services" (para.5), is addressed to "all enterprises" (para.6), "regardless of the parties involved in the transactions, acts or behaviour" (para.7) and includes "any regional groupings of States, to the extent that they have competence in the area of restrictive business practices"(para.8). The Set does not apply, however, "to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements" (para.9).

All transactions in goods and services

23. While initially covering only transactions in goods, RBP legislation in most countries has been amended to cover both goods and services. In addition, the process of "deregulation" noted above, has generally evolved in conformity with paragraph B.5, by subjecting to the rules of competition sectors of the economy which had been entirely or partially outside the scope of application of these rules.

State-owned enterprises

24. Apart from the effects of deregulation, whereby sectors previously controlled by the State, such as telecommunications and air transport, are gradually placed under the scope of competition rules in a growing number of countries, a growing number of Eastern European countries, including Hungary, Poland and the USSR,¹⁰ have adopted or are in the process of adopting or strengthening rules aimed at controlling RBPs by State enterprises.

Regional groupings of States

25. In conformity with paragraph B.8 of the Set, the Trade and Development Board, at its 35th session, second part, decided "with respect to the application of the rules of procedure of the main committees [of UNCTAD] by the Intergovernmental Group of Experts on Restrictive Business Practices, to accord intergovernmental organizations which have competence in the area of restrictive business practices, the same participation rights as those accorded to States, except for the right to vote" (Decision 356 (XXXV) of 15 March 1989). This decision applied in particular to the Commission of the European Communities.

Exemption of intergovernmental agreements from the scope of application of the Set

26. In the decade under review, paragraph B.9 has been one of the most controversial provisions of the Set. It has received very different interpretations, and consequently judgements about its application also differ widely. While the developing countries hold the view that so-called voluntary export restraints (VERs), orderly marketing arrangements (OMAs) and other RBPs used for protectionist purposes fall under the Set because they are private RBPs and neither governmental agreements nor RBPs directly caused by such agreements in the sense of paragraph B.9,¹¹ the de-

¹⁰ Report of the Intergovernmental Group of Experts on Restrictive Business Practices, seventh session, *op.cit.*, paras.62-63.

veloped market-economy countries contend that the Set applies only to RBPs of enterprises and not to such measures of trade policies, and VERs, in particular, which often result from governmental actions and policies.¹² Based on their interpretation, the developing countries come to the conclusion that the Set has not been successfully implemented against international RBPs, while the developed market-economy countries feel that in this respect at least there has been no failure to do so. Eastern European countries and China are close to the view held by the developing countries. Both positions in their extremes are difficult to reconcile with the history and the spirit of the Set. On the one hand, an interpretation of paragraph B.9, which would exempt only OPEC or other commodity agreements of developing countries, would obviously be too narrow. Comparable intergovernmental agreements of developed countries could also be exempted. Besides, many such arrangements involve both developing and developed countries. Furthermore, it seems to be in conformity with the history of the Set to assume that this instrument was not created with the intention to allow a comprehensive review of trade policies of member States, or to substitute in any way other fora like GATT competent to deal with these matters.

27. On the other hand, an interpretation which would leave all VERs, OMAs and other arrangements limiting enterprises in their international trading activities outside the Set, no matter how closely and by which means they are linked to governmental trade policies, appears to be too narrow in the other direction. Objective A.1 of the Set is clearly "to ensure that RBPs do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade ...". This shows clearly that the issues and problems of the borderline area between trade and competition policies were on the minds of those who drafted and adopted the Set. Furthermore, the developed market-economy countries agree that there are VERs which are not the result of governmental actions and policies.¹³ Thus, the fact that such arrangements between the industries of two or more countries are not exempted under B.9 appears to be clear. This raises the legitimate question of the need to specify which kind and form of governmental involvement justifies the application of B.9 referring only to "agreements". Accordingly, VERs and OMAs which are caused by unilateral governmental action might also appear to come under the Set. Furthermore, it appears to be accepted by most countries that a private RBP which is only tolerated by a foreign Government is not defensible because of this governmental toleration. Many countries, including some developed countries, go further in assuming that foreign governmental encouragement or sponsoring does not change the private nature of the RBP, with the consequence that they claim to have jurisdiction over it, and a valid defense is only accepted when there is foreign government compulsion. In view of this widely accepted view, it appears difficult to understand why national laws should be applicable to private RBPs in spite of foreign government involvement short of compulsion, but not the Set. Also, the view that the most effective way to implement the Set is to adopt and vigorously enforce national RBP legislation includes the suggestion to apply such legislation to VERs and OMAs not based on foreign government compulsion or directly caused by a sovereign act of State.

28. The Review Conference will therefore have the difficult task of reaching agreement about the implementation of the Set as far as phenomena like VERs and OMAs are concerned. For this purpose, it would seem necessary for agreement about the interpretation of B.9 of the Set to be achieved.

¹¹ *Ibid.*, para.81 and Report of the United Nations Conference to Review all Aspects of the Set, held in 1985, document TD/B/RBP/CONF.2/8.

¹² See, for example, Report of the Intergovernmental Group of Experts on its 7th session, *op.cit.*, para.21.

¹³ See, for example, *Ibid.*, para.44.

Section C - Multilaterally agreed equitable principles for the control of restrictive business practices

(i) General principles

29. The general principles in provisions C.1 - 4 are elaborated in more detail under sections E and F and are dealt with under these sections and in chapters II and III of this note dealing with information and consultations, respectively. Provision 5 of section C recognizes that certain practices authorized under the Set might be considered illegal under domestic legislation, and that the Set should not be used to justify such practices.

(ii) Relevant factors

30. Provision 6 of section C, dealing with factors relevant in the application of the Set, has been criticized by the Group of 77 as constituting a loophole of the Set because of its vagueness.¹⁴ Traditionally, a number of sectors have been excluded from RBP legislation. For instance, it is usual to exclude wage negotiations and agreements relating to wage rates by unions, etc., from such legislation. To a large extent, RBPs arising in the context of exports are outside the scope of most countries' legislation. In addition, in many countries certain activities such as banking, insurance and shipping, have been the subject of separate legislation and certain sectors of prime importance to the country, such as agriculture and mining, have their own special rules taking them outside the ambit of RBP legislation. In other cases, certain enterprises have been established under specific legislation to engage in certain activities such as the marketing of particular mineral or agricultural products, or to provide essential services such as transport, post and telecommunications, water, gas or electricity.

31. It can be noted that during the decade under review, the process of deregulation has reduced or partially eliminated exemptions. This has also involved the process of privatization of former State-owned enterprises in some developed countries, as well as in developing countries. Although it does not seem possible to establish in all cases a causal link between these developments and the requirements in the Set, they are certainly in conformity with provision C.6.

(iii) Preferential or differential treatment for developing countries

32. Provision 7 of section C provides that:

"In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

- (a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and,
- (b) Encouraging their economic development through regional or global arrangements among developing countries.

33. While it has not come to the attention of the UNCTAD secretariat that this provision has ever been used so far, attention should be drawn to the two main cases in which it might usefully be used. First, in the case of an RBP by developing country enterprises which would have adverse

¹⁴ Report of the IGE, 7th session, *op.cit.*, para.22.

effects in developed countries and where, consequently, the developed country RBP control authority would take action. Secondly, when in the developing country itself, exemption by the developing country RBP control authority could in certain cases be granted, e.g. in the case of an infant-industry or otherwise, if the firms in question have little effect on the relevant market, or need to combine in order to gain countervailing market power; in other words, where allowing certain small firms to merge or to combine activities may have pro-competitive effects.

34. It should be noted that the laws of many developed countries contain rules which allow small and medium-sized enterprises to combine their entrepreneurial activities in order to increase their competitiveness *vis-à-vis* larger enterprises. Co-operation of small and medium-sized enterprises of developing countries may also facilitate export activities of these countries, possibly even without restraining competition, i.e. in such cases in which these enterprises would individually be unable to enter into foreign markets, especially those of developed countries. Developing countries could benefit from the experiences of developed countries in this regard.

Section D - Principles and rules for enterprises, including transnational corporations

35. Provision 1 of section D, calling for enterprises to conform to the RBP laws and provisions of the countries in which they operate, and to be subject to the competence of the courts in those countries, does not seem to have been questioned during the period under review. Where problems arise, obviously, is where the country in which enterprises operate does not have RBP control legislation or relating provisions and, therefore, is not in a position to take remedial action. As indicated above, with respect to the objectives of the Set, practically all developed market-economy countries have RBP control legislation and a growing awareness of the need to control RBPs has emerged during the last years in developing countries, as well as in the Eastern European countries and China.

36. Provision 2 of section C deals with information and will be discussed under Chapter III.

37. Provisions 3 and 4 of section D cover the main restrictive business practices that enterprises should refrain from. While provision D.3 deals with restrictive business practices between enterprises engaged on the market in rival or potentially rival activities, provision D.4 relates to practices by enterprises in an abuse, or acquisition and abuse, of a dominant position of market power.

Intra-firm transactions of transnational corporations

38. Provision D.3 has often been criticized for not covering intra-firm transactions of transnational corporations, as it exempts practices by enterprises "dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other". It should be noted that practices between affiliated enterprises are covered under provision 4 of section D, where they constitute an "abuse or acquisition and abuse of a dominant position of market power". In particular, predatory behaviour and transfer-pricing in transactions between afflicted enterprises are covered under subsections (a) and (b) of D.4.

Enterprises engaged on the market in rival or potentially rival activities

39. There are basically two types of agreements among enterprises: horizontal and vertical. Horizontal agreements are those made between enterprises engaged in broadly the same activities, namely as between producers or between wholesalers, or as between retailers dealing in similar kinds of products or substitutes. Vertical agreements are those between enterprises at different

stages of the manufacturing and distribution process, for example, between suppliers of raw materials or components, to manufacturers, or between manufacturers and wholesalers, and so on with respect to retailers. Thus, enterprises engaged in rival or potentially rival activities refers to competing enterprises at the horizontal level.

40. Provision 3 contains a prohibition in principle of restrictive business practices between enterprises at the horizontal level. These include:

- (a) Agreements fixing prices, including as to exports and imports;
- (b) Collusive tendering;
- (c) Market or customer allocation arrangements;
- (d) Allocation by quota as to sales and production;
- (e) Collective action to enforce arrangements, e.g. by concerted refusals to deal;
- (f) Concerted refusal of supplies to potential importers;
- (g) Collective denial of access to an arrangement, or association, which is crucial to competition.

41. In the ten years since the adoption of the Set, there have been numerous legislative developments in both developed and developing countries relating to the practices listed above.

42. The general trend has been a considerable strengthening of control of such practices when they affect the domestic market of countries having RBP legislation. In revising their RBP legislation, many countries have strengthened the bans relating to collusive tendering, which was made a *"per se"* offence in a number of countries, and heavily increased penalties with respect to price-fixing, market or customer allocation agreements, and horizontal practices in general. Numerous cases of collusive tendering and bid-rigging, in particular with respect to government procurement contracts in the United States, the United Kingdom, France, the Federal Republic of Germany and numerous other countries, have been challenged and very heavily penalized.

43. The picture is less clear with respect to restrictive business practices affecting international trade, such as product allocation and price-fixing as to exports and imports. While there have been instances where the uncovering of domestic cartel agreements having ramifications in other countries have led to the prohibition of such agreements in these countries, on balance it would seem that developments have led to the opposite direction from what was called for in the Set. While no major change was observed with respect to existing exemptions for certain import and export cartels, except for the passing, in 1982, of the Export Trading Company Act in the United States,¹⁵ which provides antitrust immunity to certain United States export trading companies, the main reason for concern has been the rise in so-called voluntary export restraint agreements which, as noted earlier in this report, inevitably result in allocation of markets and often price-fixing in international trade.

Enterprises in an abuse, or acquisition and abuse of a dominant position of market power

44. As defined in para. 2 of section B of the Set, a *"Dominant position of market power"* refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services." Under provision 4 of section D, two interrelated concepts are involved, i.e., the abuse of an existing dominant position of market power and the acquisition and abuse of such power by use of certain restrictive business practices resulting in a firm or firms acquiring such a position of dominance over a specific market. Such practices include predatory pricing aimed at eliminating

¹⁵ See, *Annual Report 1982 on legislative and other developments in developed and developing countries in the control of restrictive business practices* (TD B RBP 11), para.29.

competitors; discriminatory pricing, including through the use of the transfer-pricing mechanism when involving transactions between affiliated enterprises; mergers, takeovers, joint ventures or other acquisitions of control; fixing the prices at which goods can be sold in the importing country; and restrictions on the importation of goods by the abuse of trademark rights. They also include refusals to deal, exclusive dealing, tied purchasing and other restrictions in the marketing and distribution of goods and services, when not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service.

45. In the ten years since the adoption of the Set, a certain emphasis has been placed on challenging vertical restraints by firms in a dominant position of market power in many amendments to existing RBP legislation in developed countries. This has also been generally the case in new RBP legislation introduced in developing countries. Particular concern has been noted with respect to strengthening the control over mergers and takeovers, in most countries, as well as the Commission of the European Communities. In some instances, for example, in the Federal Republic of Germany, such control has also involved mergers taking place altogether outside the territory of the country taking action, but having effects in that country.¹⁶

46. In the United States, the policy concerning vertical restraints and mergers has been the subject of considerable rethinking in the period under review, leading to much stronger control action being taken over horizontal practices than vertical ones.¹⁷

Section E - Principles and rules for States at national, regional and subregional levels

47. Provision 1 of section E calls for States at the national level or through regional groupings, to adopt, improve and effectively enforce RBP legislation. This provision elaborating on provision 1 of section C is probably the most important of the Set addressed to States. First, adopting and vigorously enforcing national and regional RBP laws allows the solving of many, if not most, RBP problems entirely or in part. Second, doing so closes a credibility gap in relation to countries already enforcing national RBP laws. Such countries might be reluctant to exchange information and co-operate with countries which do not apply RBP legislation in the same way they co-operate with countries having similar rules on competition. The question is why should a country act against RBPs in the interest of another country if this country is opposed to the philosophy of competition and is not prepared to do what it can itself? A growing number of countries, including others than developed market-economy countries, have adopted or improved RBP legislation in the last ten years. This development is in line not only with provisions E.1 and C.1; but also with objective A.2 (a) of the Set. This trend has coincided to a considerable extent with a move in many countries towards more market-oriented economic policies. As the need to introduce and enforce RBP legislation increased, so did the need for technical assistance, advisory and training services. In this respect the situation has changed considerably since the Set was adopted. In addition to the work on a model law or laws, and on the Handbook on RBP legislation, technical assistance of a new dimension is needed now as compared with the assistance which took place in the recent past.

48. Increasingly, the UNCTAD secretariat is requested by individual States to provide advisory services, technical assistance and training of officials in relation with the introduction of RBP legislation. Proposals in this respect for consideration by the Review Conference are made below, in the discussion dealing with technical assistance under provisions 6 and 7 of section F.

49. Provision 2 of section E, which elaborates on C.1, calls for States to adopt domestic legislation covering RBPs affecting their trade or economic development. RBP laws adopted, improved and enforced in the last ten years appear to be in conformity with this goal.

¹⁶ See, in particular, document TD/B/RBP/48, Part I, dealing with preliminary work on the study on concentration of market power, paras. 10-22.

¹⁷ The views of the United States Government on vertical restraints and on mergers are described in the 1985 *Guidelines on Vertical Restraints*, the Justice Department *Merger Guidelines* of 1984 and the 1988 *Antitrust Enforcement Guidelines for International Operations - A Competition Policy for the 1990s*. For more details, see UNCTAD *Annual Reports*, in particular TD/B/RBP/61 paras.45-47, TD/B/RBP/51 paras.21-26 and TD/B/RBP/29 paras. 14-15.

50. Provision 3 of section E calls for treatment of enterprises by States to be fair, equitable on the same basis to all enterprises, and in accordance with established procedures of law. Furthermore, the laws and regulations should be publicly and readily available. The UNCTAD secretariat is not aware of any breach of this provision. Moreover, through the publication of the Handbook on RBP legislation in all countries, it assists in the dissemination and better understanding of existing RBP legislation throughout the world.

51. Provision 4 of section C calls on States to seek appropriate remedial or preventive measures against restrictive business practices which are in their competence when it comes to their attention that such practices adversely affect international trade, and particularly the trade and development of the developing countries. This provision can be interpreted in different manners. First, it may require States to take action against specific practices under their competence when another State affected by the practices in question requests such assistance. Second, if such assistance in terms of direct remedial action is not possible because the restrictive business practices in question have no effect on the territory of the country where they originate, it may assist the requesting State by providing the necessary information for the requesting State to be able to take action on its own territory where the adverse effects are felt. Third, the provision has been interpreted as meaning that in the second alternative, the State in question should take direct remedial action if developing countries are affected, even if there is no effect on its own territory. The developed market-economy countries have opposed this view for a number of reasons relating to public international law and national constitutional law. The UNCTAD secretariat is unaware of this provision having ever been used in its stricter sense. Ideally, it should be possible to combat RBPs where they have adverse effects, provided that the country where the effects are felt has appropriate legislation and enforcement authority. The first practical step in this direction, therefore, seems to be to implement vigorously provision 1 of section E, namely, to adopt national or regional RBP legislation.

52. Provisions 5, 6, 7, 8 and 9 all deal with issues of information, and will be discussed under chapter II of this note.

Section F - International measures

53. The objective formulated in provision 1 of section F is a long-term one. Even among countries which adopted RBP laws a long time ago and which effectively enforce these laws, divergences are still substantial. Certain trends towards a harmonization of competition laws, especially in Western Europe, are discernable. Although this trend can be attributed not to the Set but rather to a growing understanding of the necessities of protecting competition, it seems obvious that its implementation is closely linked to that of provision 1 of section E, namely, the adoption and enforcement of RBP legislation in all countries. Provisions 2 and 3 of section F deal with information and are discussed in chapter II. Provision 4 concerns consultation procedures, and are the subject elaborated under chapter III of this note.

Model law or laws and technical assistance

54. Provision 5 dealing with the continuation of work within UNCTAD on the elaboration of a model law or laws on RBPs in order to assist developing countries in devising appropriate legislation, is closely linked with the issue of technical assistance, dealt with under provision 6 and 7, and is of crucial importance, both as an element of technical assistance and as an element of achieving common approaches in national policies, as called for in provision 1 of this section of the Set. So far, the UNCTAD secretariat has issued "Elements for provisions of a model law on restrictive business practices" (TD/B/RBP/15/Rev.1), which contains possible elements for consideration in the drafting of articles of a law on restrictive business practices, together with a detailed commentary on these articles describing the different manners in which the subject of each article is treated under existing legislation in different countries. In the ten-year period since the adoption of the Set, trends in legislation have evolved considerably in certain instances. Therefore, the

secretariat has issued initial proposals for updating and supplementing the commentary to these articles in chapter IV of document TD/B/RBP/48, and is in the process of revising document TD/B/RBP/15/Rev.1 accordingly.

55. Provisions 6 and 7 on technical assistance, advisory and training programmes on restrictive business practices began to be implemented only in 1986, with the first regional African seminar on RBPs, held in Nairobi (Kenya) thanks to voluntary contributions received from Norway and Sweden. The same contributing countries made it possible in 1987 to hold a regional Asian seminar on RBPs in Bangkok (Thailand) and a regional Latin American seminar scheduled to take place in the first half of 1990. Contributions from France made it possible to hold a second regional African seminar for French-speaking countries in Douala (Cameroon) in 1989. The Federal Republic of Germany has organized two seminars in Berlin (West), one for developing countries in general, the second for Asian countries, and is planning to hold a third one in Latin America in July 1990. The Soviet Union will contribute for the holding of a training seminar for Asian developing countries, to take place in Moscow during the second half of 1990.

56. Apart from regional seminars, there have been exchanges of personnel arranged under the auspices of UNCTAD, in particular training courses in Sweden for officials from China, Cuba, Pakistan and Sri Lanka, and in the Federal Republic of Germany for two officials from Kenya. UNCTAD participated in a Symposium on Competition and Development at the OECD headquarters in Paris. In addition to this, the UNCTAD secretariat is receiving ever mounting demands by individual States for advisory and training services as well as national training seminars and workshops. These considerable demands require financing and manpower, which the UNCTAD secretariat, in its present form is unable to satisfy. It is therefore urgent for the Review Conference to consider the question of availability of resources for the RBP technical assistance programmes.

57. Technical assistance is today more important than ever before in view of the fact that a number of countries have recently introduced elements of market-oriented policies and consequently have to rely on competitive processes and on RBP legislation to protection competition also in their home markets. Technical assistance may become even more important in the future, as this trend becomes confirmed.

Section G - International institutional machinery

(i) Institutional arrangements

58. The Intergovernmental Group of Experts on Restrictive Business Practices, established in 1981, has provided the institutional machinery dealing with RBPs. Dissatisfaction with its results led the developing countries to request the Review Conference in 1985 to upgrade the IGE into a Committee of UNCTAD. No consensus was reached on this issue at the 1985 Review Conference.

(ii) Functions of the Intergovernmental Group

59. Apart from the request to transform the IGE into a Committee, the Functions of the Group, as listed in provision 3 of section G, have never been challenged. On various occasions, the Eastern European countries have requested that there be better implementation of Function 3 (c) of the IGE, namely that relating to relevant studies, documents and reports from relevant organizations of the United Nations system, such as the UNCTC.

(iii) Review procedure

60. In line with provision 6 of section G, the first United Nations Conference to Review all Aspects of the Set was convened in 1985¹⁸. The 1990 Review Conference might decide to request the General Assembly to convene a third Review Conference in 1995.

¹⁸ See Report of the United Nations Conference to Review all Aspects of the Set, document TD B RBP CONF.2 8.

Chapter II

OVERVIEW OF THE EXISTING POSSIBILITIES OF SUPPLYING, OBTAINING AND MAKING AVAILABLE INFORMATION ON RBPS ADVERSELY AFFECTING INTERNATIONAL TRADE

61. The Set contains a number of provisions dealing with different aspects of supplying and obtaining information useful or necessary for the formulation and effective enforcement of RBP legislation. In its Final Act, UNCTAD VII agreed "to continue and strengthen the ongoing work in UNCTAD in respect of RBPs, particularly with a view to ensuring transparency"¹⁹ Dissatisfaction with the implementation of the relevant provisions of the Set was expressed, especially by the developing countries, in addressing the issue of "transparency" at the seventh session of the IGE on RBPs.²⁰ The relevant provisions relating to information of the Set are analyzed below from the point of view of their applicability, whether they need to be amended, whether there are other ways to improve transparency and which steps should or could be envisaged in the Review Conference.

Appropriate mechanisms for the exchange and dissemination of information among Governments

62. Provision 3 of section C calls for appropriate mechanisms to be devised at the international level and or the use of existing international machinery improved to facilitate exchange and dissemination of information among Governments with respect to RBPs. While this general principle is further elaborated in paras. 6 and 7 of section E, and in section F, of the Set, the ideal situation would be one where transparency in the area of RBPs is similar to that existing under GATT trade restraint notification mechanisms, which ensure that any measure adopted is immediately known to other trading partners. A similar system does not exist at present in the area of RBPs. If existing governmental barriers to trade as covered by GATT rules were to gradually disappear, to be replaced by enterprise-level restrictive business practices, as is feared by many experts, there would follow a considerable deterioration of transparency in existing trade measures.

63. In provision 2 of section D, second and third sentence, enterprises are requested to provide information, such as details of restrictive arrangements, required by competent authorities of countries affected, including information which may be located in foreign countries, to the extent that such disclosure is not prevented by laws or public policy. While many countries have adopted legislation prohibiting the disclosure of information by enterprises when such information is to be used by foreign courts, the extent to which such "blocking statutes" have been resorted to by firms in declining to provide information sought by investigating authorities, is unknown to the UNCTAD secretariat. Accordingly, it would seem appropriate first to establish the facts allowing an assessment of the operation of this provision of the Set. Countries could be invited to inform the UNCTAD secretariat about the implementation of this provision of the Set; in how many instances, and on what legal basis, have they requested information from firms which were located abroad; what types of RBPs were involved; which type of enterprises, and with what results?

64. Provision 5 of section E requests States to safeguard information containing legitimate business secrets obtained from enterprises. This is essential for the willingness of firms to co-operate and provide information. There is no concrete information that States have not honoured their obligations under this rule.

65. Provision 6 of section E calls for States to institute or improve procedures for obtaining information from enterprises. In this connection, the views of the developing countries that "States

¹⁹ Final Act of UNCTAD VII, para.105 (18).

²⁰ See report of the IGE on RBPs, 7th session, *op.cit.*, para.29.

which so far have not done so should establish a public registration system of all RBPs originating in their country and which could adversely affect international trade, particularly the trade and development of developing countries"²¹ would seem to be in line with this provision of the Set.

66. The same applies for provision 7 of section E, which calls for States to establish appropriate mechanisms at regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area. The developing countries suggest that "States and, in particular, those developed countries which already collect such information on a discreet basis, should agree to open their registries to foreign trade partners wishing to deal with the domestic enterprises in question".²² As a further step towards improving transparency, the developing countries suggest that "information concerning RBPs adversely affecting international trade should be notified to a centralized registry to be established in UNCTAD, open for consultation by any State upon request".

67. Notification and public registration procedures as suggested by the developing countries, if adopted, would constitute additional obligations under E.7 and 9. For this to be effective, however, all States might have to adopt RBP legislation in line with provisions E.1, 2 and 6 of the Set.

68. Countries which have not yet done so are obviously likely to face reluctance from other States in the context of E.7 and 9. It might well be that States complying with these provisions of the Set will not be prepared to co-operate and exchange information to the extent possible and desirable with countries not subscribing to the principles of effective economic competition in their national markets. Therefore, it can be expected that as fuller use is made of provisions E.1, 2 and 6 of the Set, progress along the lines of E.7 and 9 and towards the suggestions of the developing countries, may be achievable. As a first step, such arrangements might be more easily applicable at regional or subregional levels, as mentioned in provision E.7. In the context of regional groupings of States, for example, agreement could be sought among members to institute notification and registration of RBPs and to create a centralized registry of all RBP information collected, providing for exchange of information on RBP cases as well as legislation of member countries.

69. Provision 8 of section E calls for States with greater expertise to share their experience or otherwise provide technical assistance, on request, to States wishing to develop or improve their systems for the control of RBPs. As indicated in the discussion related to technical assistance in chapter I, since 1986 a growing number of developed countries are becoming active in providing experts to share their experience or otherwise assist developing countries in developing their RBP legislation and control capability. This process has considerably accelerated in the last two to three years, and it is hoped that this trend will continue, as the demands are considerable.

70. Provision 9 of section E requests States on request or at their own initiative, to provide other States with publicly available information and, to the extent consistent with their laws and public policy, other information for the effective control of RBPs. This provision, and provision E.7 discussed above, are in line with the international standard set up by the OECD Guidelines and Recommendations.²³ In essence, they do not go further than the OECD Guidelines and Recommendations, nor are they less demanding. Even the bilateral governmental agreements so far concluded between some developing countries on co-operation in RBP matters are at the same level. The closer interrelationship between implementing sections E.1., E.2., and E.6 and upgrading of technical assistance, including as provided under section E.8, could start a "beneficial spiral" in the sense that progress made in these fields could improve goodwill by all States to exchange and provide information which, in turn, could have a positive effect on the implementation of all the provisions of the Set.

71. Provision 2 of section F calls for States and regional groupings to communicate annually to the Secretary-General of UNCTAD steps they have taken to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices. In compliance with this

²¹ Report of the IGE on RBPs, 7th session, *op.cit.*, para.29.

²² *Ibid.*, para.29.

²³ OECD Council, Revised Recommendation of the Council concerning co-operation between Member countries on restrictive business practices affecting international trade. Document C (86) 44 (final).

provision, the UNCTAD secretariat has reproduced for each annual session of the IGE on RBPs the replies of Governments to requests for information in this respect from the Secretary-General of UNCTAD. The replies under this provision of the Set very often become muddled with the general information sought for the preparation of the Annual Reports on legislative and other developments in the field of RBPs, which is produced pursuant to provision 3 of section F. The Annual Report contains detailed information about the adoption, development and application of legislation, regulations and policies concerning RBPs. It would thus be desirable for the replies to provision F. 2 to concentrate more precisely on measures taken by States to meet their commitment to the Set.

Chapter III

ANALYSIS OF THE CONSULTATION PROCEDURE, AND OF THE POSSIBILITIES TO MAKE USE OF SUCH PROVISIONS

72. Provision 4 of section F provides for consultation procedures in the same way as did the Havana Charter in 1946, the 1953 ECOSOC Draft and the 1960 "Restrictive Business Practices Arrangement for Consultations" under GATT, and as agreed among Group B countries in the OECD Council Recommendations of 1973, 1979 and 1986.²⁴ Most of these procedures have not become effective or have not been used. If, like the OECD procedure, they have been used, it would seem to have been to a large extent on an informal basis and agreed upon in an *ad hoc* manner between the parties to the consultation. Thus, at the present time there would seem to be no perfect model for a well-functioning international consultation procedure in the field of RBPs. It appears therefore necessary to analyze the reasons for the non-application of the consultation procedure provided for in the Set, and to consider ways and means to make it more applicable.

73. The first problem in assessing the application of provision F.4 correctly lies in the fact that there is no concrete evidence of the reasons why the consultation procedure has not been used so far. There is, in particular, no evidence that countries have formally requested information under section F.4 and have been refused by the country addressed. Likewise, there is no evidence that countries have tentatively and informally addressed other countries and then were discouraged from making a formal request for consultations. There is also no evidence that countries felt the need for consultations but, before initiating them, came to the conclusion that a satisfactory solution was not to be expected from such a procedure and waived the opportunity. The fact, however, that many countries could refer to the "effects doctrine" - namely, that their laws do not apply when the effect of an RBP is not felt within their territory - in order to decline taking remedial action against RBPs being subject to consultations, might well discourage the initiation of consultation procedures. Another possibility - although there is no evidence for it - is that consultations have taken place, but informally and outside the framework of F.4 of the Set.

74. Other explanations for the lack of success of provision F.4 are possible. It could be that States saw no need to seek consultations simply because there were no RBPs, or because they were not aware of any RBPs affecting them, or that they dealt with RBPs satisfactorily without any need for consultations with other States. Another explanation might be that States, in particular developing countries, may feel the need for consultations in certain cases, but find themselves not adequately equipped to bring a specific case at the international level.

75. In view of the lack of response to the consultation procedure in the Set, and the lack of knowledge about the reasons for this, there are basically three options for action by the IGE. First, a fact-finding study could be initiated to determine which of the possible explanations for the non-application is valid and, if several explanations are valid, how important they are with respect to each other. A second option would be to recommend that provision F.4 be amended and a third, to look for means to stimulate the interest of countries in the consultation procedure and facilitate its use without amending the provisions. The first and second options are linked, as any change in the consultation procedure in the Set should be based on more knowledge about facts. Therefore, a change in the wording of provision F.4 should be based upon, first, a thorough fact-finding study.

76. In view of the obvious difficulty for such a study to reach solid conclusions, the third option, namely to recommend or adopt certain measures to stimulate and facilitate the use of the consultation procedures in provision F.4 of the Set, might be the most appropriate at this stage. It might be necessary to take into consideration, first, the diversity of situations regarding the RBP issues, which exists in the developing countries. Some countries are unaware of the RBP issues altogether; others are concerned but not equipped to take effective action as they have no legislation and RBP

²⁴ The 1986 OECD Council Recommendation C (86) 44 (Final) supersedes the previous ones of 1973 and 1979.

control authority; still other developing countries have RBP legislation, but are not sufficiently equipped to apply it effectively to all RBPs adversely affecting their trade and development. In this context, the views of the developing countries expressed at the seventh session of the IGE should be recalled.²⁵

77. The first consideration in their suggestion,²⁶ is that one of the possible reasons for developing countries not using the consultation procedure is the lack of sufficient knowledge about RBPs. In this case, technical assistance is imperative, in particular to help these countries adopt and effectively implement RBP legislation, in line with provisions 1, 2 and 6 of section E.

78. The second consideration applies to countries where RBP legislation exists, but the RBP control authority is not fully equipped to take action with respect to practices involved with international trade transactions.²⁷ These RBPs might be, for example, in the form of collusive tendering in response to tenders for government procurement of goods and services that need to be imported. With respect to exports, access to overseas markets for domestic goods might be hampered by the existence of cartel arrangements in the targeted markets. In both cases, the domestic RBP control authority might not be equipped to deal with those practices originating from outside the national territory, where the domestic RBP legislation does not apply. In addition, the ministries, domestic authorities, or exporting firms confronted with such RBPs originating from abroad, might not be well aware of the practices involved and, more especially, the remedial procedures.

79. Therefore, the idea of a domestic machinery in developing countries, aimed at co-ordinating the functions of the RBP control authority with those ministries and authorities, such as the Central Bank, responsible at one stage or another for monitoring imports and or exports, might be instrumental in sensitizing these national authorities to issues of competition, thus facilitating their capacity to detect and inform the RBP control authority of the existence of a restrictive business practice. As suggested by the developing countries:

"Such co-ordination should be reinforced by the establishment of, for example, an inter-ministerial focal point on RBPs directly in contact with the Ministry of Foreign Trade, as well as with other ministries and authorities having competence with enterprises and international trade transactions in both goods and services and closely linked with the RBP control authority. Such focal points would be essential in the detection of RBPs occurring with respect to imports, such as collusive tendering affecting import procurement, or to exports where such exports were hampered by practices originating from abroad. The task of the RBP focal point would be to detect such practices when they occurred with the help of enterprises and their respective chambers of commerce. Once an RBP had been detected, a communication procedure could be followed, leading to the presentation of the issue to the RBP control authority. In case of difficulty in the investigations, or information-gathering, or the resolution of the case, the RBP focal point could then engage in consultations with the authorities of the State or States where such RBPs originated, with a view to finding a mutually acceptable solution."²⁸

80. Another way of ensuring co-ordination of the RBP authority with other ministries and bodies might be by prescribing that the membership of the RBP authority is to be composed of high-ranking officials from other competent ministries and authorities, such as is the case in the RBP authorities of certain countries.²⁹

81. In countries where no RBP control authority exists so far, it could be suggested that in the short term an "RBP focal point", as described above, could be established, which could engage, if needed, in consultations with other States under the auspices, for instance, of the Ministry of Foreign Trade. Whereas in countries where the RBP control authority exists, the consultation procedure with other States would be within the competence of that authority.

82. As to the precise steps of the consultation procedure itself, many questions remain which

²⁵ Report of the IGE, 7th session, paras.30-32.

²⁶ Report of the IGE, 7th session, para.30.

²⁷ *Ibid.*, para.31.

²⁸ *Ibid.*, para.31.

²⁹ See in this respect, "Elements for provisions of a model law on restrictive business practices", UNCTAD document TD/B/RBP/15 Rev.1, para.178.

might usefully be better defined and agreed upon. For example, how could the RBP authority, or the "RBP focal point", approach other States? Should it approach the RBP control authority of the other State or States directly, or through the appropriate Ministries? Once a request for consultations is lodged, to what extent is the country receiving the request obliged to respond to it? Does the consultation-receiving country have the juridical possibility to take legal action against RBPs originating in its territory but having no adverse effects there? Is it empowered, at least, to transmit relevant information necessary for the courts in the consultation-requesting country to resolve the case? In case consultations do not turn out satisfactorily, should there be a further procedure leading to relief, as exists for trade measures under the GATT?

83. A number of elements with respect to the more precise definition of consultation procedures are included in the views expressed by the developing countries at the 7th session of the IGE on RBPs, which are reproduced below³⁰

"In order to make such consultations more feasible and practically useful to all countries, and particularly to developing countries, it was essential that the elements of such consultations be defined more precisely. These should, in principle, include:

- Subjects of consultation;
- Objectives and principles of consultation;
- Consultation modalities;
- Logistical elements;
- Handling of the outcome of consultation.

Some important elements that would be incorporated into the defined consultation framework would be as follows:

- Consultations could be conducted not only when RBPs cases were disputed but also when there was difficulty in the investigation process;
- Special arrangements and mutual undertakings could be made in relation to possible greater access to relevant information, documents and data which might be of essential importance for conducting constructive and fruitful consultations;
- Remedial action to counter the adverse effects of the RBPs in question should also be sought and agreed upon in the consultation process;
- Special and preferential treatment of developing countries should be one of the main principles that should govern the outcome of the consultations;
- Possible participation of a third party in the consultation process, upon request by the claiming party. This third party could be another country whose trade or development was also affected by the same RBPs in question;
- Possible involvement of advisory and/or mediatory agents, subject to approval by the parties to the consultation;
- A more precisely defined and wider role for UNCTAD to play in the preparation for and the assistance required in holding such consultations. In addition to the existing relevant provisions in the Set, the role of UNCTAD could also include the possibility of a follow-up process to the outcome of such consultations. An additional function of conciliation to the existing functions of the Intergovernmental Group could also be explored;
- The date, duration and venue of consultations should be decided by the parties concerned. In this respect, due account should be taken of the financial burdens on developing countries and, in particular, on the least developed countries;
- Representation of Governments in such consultations could include, when appropriate, representatives of the enterprises concerned, or of their respective chambers of commerce."

³⁰ See Report IGE 7th session, *op.cit.*, para.32.

84. In the light of the above analysis, action as follows might be recommended in order to improve the application of the consultation procedures, as contained under paragraph 4 of section F of the Set:

- (i) To increase efforts to implement sections E.1, E.2 and E.6 of the Set in order to widen the number of countries able to fully participate in consultations;
- (ii) To upgrade technical assistance with this objective in mind;
- (iii) To prepare a study on ways and means to improve the ability of RBP control authorities to detect and take effective action in respect of RBPs affecting imports or exports, including measures to ensure full co-ordination between the RBP control authority and the various ministries and authorities competent with import and export operations; giving examples of specific cases in which a request for consultation with another country should be considered; and defining practical steps for lodging and undertaking such a consultation procedure.
- (iv) To set up or update the a list of authorities in member States empowered to lodge and receive requests for consultation.
- (v) To set up procedures by which a Government to which the request for consultation is addressed responds to it within a stipulated time and enters into a meaningful consultation.

85. It is necessary to establish confidence in the process of consultation so that Governments consider it worthwhile to prepare their requests for consultations.

Chapter IV

CONCLUSIONS AND PROPOSALS FOR ACTION

86. In assessing the application and implementation of the Set, more attention should be paid to the fact that its aims are highly interconnected and that some of its parts have to be implemented before others can become fully operational. It would seem that the parts that need first to be fully implemented in this respect are provisions 1, 2 and 6 of section E, namely those dealing with the adoption and enforcement of appropriate RBP legislation by States, including the institution of procedures to obtain appropriate information from enterprises. This part of the Set is closely related with provisions E.8 and F.6 and 7, dealing with technical assistance. Both issues are interrelated and need an appropriate response. Developments in that respect have started to accelerate in the last few years, but the Review Conference should be instrumental in setting the base for wider and more specifically tailored technical assistance, advisory and training programmes to be set in motion. A very serious study of the financial aspects of technical assistance will have to be made.

87. Concerning the issue of information and transparency, it would seem that the existing possibilities under the Set have not yet been fully implemented. It may be expected that with further progress on legislation and technical assistance, as mentioned above, all regional Groups will become better equipped and also more willing to upgrade the exchange of information above its present level. Further steps in this respect would include the setting-up of domestic notification and registration procedures regarding RBPs affecting exports and imports, to be followed by notification of such information to all interested trading partners through the establishment of a centralized information system.

88. An intermediate step might be the establishment of regional or subregional RBP information centres, in accordance with provision E.7, where member countries of regional groupings of States or other arrangements, would collect and exchange information on RBPs likely to adversely affect the trade and development of member countries.

89. The consultation procedures contained in provision 4 of section F of the Set, which are of particular interest to developing countries, would correspond better to the needs of these countries, if developing countries were in a better position to effectively detect, investigate and control RBPs adversely affecting their trade and development. For those countries where RBP legislation does not exist, it would be necessary first to implement provisions 1, 2 and 6 of section E of the Set, and as an immediate step, at least to establish an "RBP focal point" competent to deal with RBP issues. For developing countries which already have RBP legislation, better co-ordination of the RBP control authority with the authorities responsible for external trade might be necessary. Such co-ordination could materialize through the establishment of an inter-ministerial RBP liaison office or "RBP focal point", the task of which would be to ensure that the Ministry of Foreign Trade and other authorities dealing with external trade transactions (such as the Central Bank, or government procurement officials) are fully aware of RBP issues, and able to detect and bring them to the attention of the RBP authority if they arise. These authorities would also be in a position to make full use of the procedure established under F.4 of the Set. A study on these issues might prove useful. Once again, the importance of technical assistance in this respect should be stressed. It would also be useful to set up or update the list of authorities empowered to lodge and receive requests for consultation. The process of consultations will be effective, and Governments will be encouraged to utilize it, if Governments to which requests for consultation are addressed respond promptly and enter into meaningful consultations.

90. In the event of a consultation procedure not bringing relief to the affected party, some effective follow-up procedure for relief would have to be established.

91. Other issues which might be considered for the Review Conference include:
- (a) The scope of application of the Set with respect to VERs and OMAs, when these do not result specifically from intergovernmental agreements, as exempted under paragraph 9 of section B of the Set.
 - (b) The international institutional machinery under section G of the Set.
 - (c) A further review procedure in 1995.



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PREPARATIONS FOR THE SECOND UNITED NATIONS CONFERENCE TO REVIEW
ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE
PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS
PRACTICES: PROVISIONAL RULES OF PROCEDURE FOR THE CONFERENCE

Draft provisional rules of procedure of the Conference

Prepared by the UNCTAD secretariat

DRAFT PROVISIONAL RULES OF PROCEDURE OF THE CONFERENCE

CONTENTS

<u>Rule</u>	<u>Page</u>
Chapter I - REPRESENTATION AND CREDENTIALS	
1. Participation	1
2. Composition of delegations	1
3. Alternates and advisers	1
4. Submission of credentials	1
5. Credentials Committee	2
6. Provisional participation in the Conference	2
Chapter II - OFFICERS	
7. Elections	2
8. Term of office and replacement	2
9. Absence of the President	3
10. Voting rights of the President	3
11. Temporary President	3
Chapter III - SECRETARIAT	
12. Direction by the Secretary-General of UNCTAD	3
13. Administrative duties of the secretariat of the Conference	3
14. Statements by the secretariat	4
Chapter IV - CONDUCT OF BUSINESS	
15. Quorum	4
16. General powers of the President	4
17. Speeches	5
18. Precedence	5
19. Points of order	5
20. Closing of list of speakers	5
21. Right of reply	6
22. Adjournment of debate	6
23. Closure of debate	6
24. Suspension or adjournment of the meeting	6
25. Order of motions	7
26. Proposals	7
27. Other proposals and substantive amendments	7
28. Decisions on competence	7
29. Withdrawal of proposals and motions	8
30. Consideration of programme budget implications	8
31. Reconsideration of proposals	8

CONTENTS (continued)

<u>Rule</u>	<u>Page</u>
Chapter V - DECISION-MAKING	
32. Consensus	8
33. Voting rights	8
34. Majority required	9
35. Method of voting	9
36. Conduct during voting	9
37. Explanation of vote or position	9
38. Division of proposals	10
39. Amendments	10
40. Order of voting on amendments	10
41. Order of voting on proposals	11
42. Elections	11
43. Balloting	11
Chapter VI - SUBSIDIARY BODIES	
44. Negotiating Group and subsidiary bodies	12
45. Officers	12
46. Applicable rules	12
Chapter VII - LANGUAGES	
47. Languages of the Conference	12
48. Interpretation	13
49. Languages of official documents	13
Chapter VIII - RECORDS AND REPORTS	
50. Records of meetings	13
51. Sound recordings	13
52. Report or Final Act of the Conference	13
Chapter IX - PUBLIC AND PRIVATE MEETINGS	
53. Plenary	14
54. Subsidiary bodies	14
55. Communiqués on private meetings	14

CONTENTS (continued)

<u>Rule</u>	<u>Page</u>
Chapter X - OTHER PARTICIPANTS AND OBSERVERS	
56. Representatives of organizations that have received a standing invitation from the General Assembly to participate in the capacity of observers in the sessions and work of all international conferences convened under its auspices	14
57. Representatives of national liberation movements	15
58. Representatives of the specialized and related agencies ..	15
59. Representatives of other intergovernmental organizations .	15
60. Representatives of interested United Nations organs	15
61. Representatives of non-governmental organizations	15
62. Written statements	16
Chapter XI - AMENDMENT AND SUSPENSION OF THE RULES OF PROCEDURE	
63. Method of amendment	16
64. Method of suspension	16
65. Other procedural matters	16

DRAFT PROVISIONAL RULES OF PROCEDURE OF THE CONFERENCE

Chapter I

REPRESENTATION AND CREDENTIALS

ParticipationRule 1

Participation in the Conference shall be open to:

(a) All States;

(b) Regional groupings of States which have competence in the area of restrictive business practices and have accepted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; */ and

(c) Other participants and observers referred to in operative paragraph 4 of General Assembly resolution 33/153 of 20 December 1978.

Composition of delegationsRule 2

Each delegation participating in the Conference shall consist of a head of delegation, and not more than two other accredited representatives, and such alternate representatives and advisers as may be required.

Alternates and advisersRule 3

The head of the delegation may designate an alternate representative or an adviser to act as a representative.

Submission of credentialsRule 4

The credentials of representatives of States and the names of alternate representatives and advisers shall be submitted to the Secretary-General of UNCTAD, if possible not later than one week before the date fixed for the opening of the Conference. Any later change in the composition of delegations shall also be submitted to the Secretary-General of UNCTAD. The credentials shall be issued by the Head of State or Government or by the Minister for

*/ Reference to regional groupings of States in this rule is based on the definition contained in section B, paragraph 8, of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The draft rule does not confer on such regional groupings the right to vote.

Foreign Affairs or by the Permanent Mission to the United Nations of the State at Geneva upon the explicit authorization of the Head of State or Government or the Minister for Foreign Affairs.

Credentials Committee

Rule 5

A Credentials Committee of nine members shall be appointed at the beginning of the Conference. Its composition shall be based on that of the Credentials Committee of the General Assembly of the United Nations at its forty-fifth regular session. It shall examine the credentials of representatives and report to the Conference without delay.

Provisional participation in the Conference

Rule 6

Pending a decision of the Conference upon their credentials, representatives shall be entitled to participate provisionally in the Conference.

Chapter II

OFFICERS

Elections

Rule 7

1. The Conference shall elect, with due regard to equitable geographical distribution:

(a) From among the representatives of participating States, the following officers: a President and a Rapporteur.

(b) From among the participating States: 17 Vice-Presidents.

2. The President, the 17 Vice-Presidents and the Rapporteur shall constitute the Bureau of the Conference.

Term of office and replacement

Rule 8

1. Should the Conference hold more than one session, and unless the Conference decides otherwise, all officers shall serve for all sessions of the Conference.

2. If an officer resigns or ceases to be able to perform his functions or to be a representative of a participating State, the Conference shall, as soon as possible, elect a new officer. If the office thus vacated is that of the

President, the other officers which constitute the Bureau shall select one of the Vice-Presidents to serve as Acting President until the new President has been elected.

Absence of the President

Rule 9

1. If the President is to be absent from a meeting or any part thereof, he shall designate a Vice-President to take his place.
2. A Vice-President acting as President shall have the same powers and duties as the President.

Voting rights of the President

Rule 10

The President, or a Vice-President acting as President, shall not vote in the Conference, but may designate another member of his delegation to vote in his place.

Temporary President

Rule 11

At the opening of the Conference, the Secretary-General of UNCTAD or a member of the secretariat designated by him shall preside until the Conference has elected its President.

Chapter III

SECRETARIAT

Direction by the Secretary-General of UNCTAD

Rule 12

On behalf of the Secretary-General of the United Nations, the Secretary-General of UNCTAD shall be responsible for all arrangements necessary for the carrying out of the work of the Conference. For that purpose he shall appoint such staff as may be required. The Secretary of the Conference shall act in that capacity at all meetings and shall be responsible for making all arrangements connected with such meetings.

Administrative duties of the secretariat of the Conference

Rule 13

The secretariat of the Conference shall, in accordance with these rules and any pertinent directives of the General Assembly:

- (a) Interpret speeches made at meetings;

- (b) Make and arrange for the keeping of sound recordings of meetings;
- (c) Receive, translate and circulate the documents of the Conference;
- (d) Report the proceedings of the Conference in appropriate journals;
- (e) Publish and circulate any report or final act of the Conference;
- (f) Arrange for the custody of the documents and records of the Conference in the archives of the United Nations;
- (g) Generally perform all other work that the Conference may require in connection with its proceedings.

Statements by the secretariat

Rule 14

The Secretary-General of the United Nations or the Secretary-General of UNCTAD, or any member of the secretariat designated by either of them for that purpose, may at any time make either oral or written statements concerning any question under consideration.

Chapter IV

CONDUCT OF BUSINESS

Quorum

Rule 15

The President may declare a meeting open and permit the debate to proceed when representatives of at least one-third of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken.

General powers of the President

Rule 16

1. In addition to exercising the powers conferred upon him elsewhere by these rules, the President shall preside at the plenary meetings of the Conference, declare the opening and closing of each such meeting, direct the discussions, ensure observance of these rules, accord the right to speak, put questions to the vote and announce decisions. The President shall rule on points of order and, subject to these rules, have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the closure of the list of speakers, a limitation on the time to be allowed to speakers, and on the number of times each representative may speak on a question, the adjournment or the closure of the debate, and the suspension or the adjournment of a meeting.

2. The President, in the exercise of his functions, shall remain under the authority of the Conference.

Speeches

Rule 17

1. No one may address the Conference without having previously obtained the permission of the President. Subject to rules 18, 19 and 22 to 24, the President shall call upon speakers in the order in which they signify their desire to speak.

2. All interventions shall be confined to the question before the Conference and the President may call a speaker to order if his remarks are not relevant to the subject under discussion.

3. The Conference may limit the time allowed to speakers and the number of times the representatives of each participant may speak on a question. Permission to speak on a motion to set such limits shall be accorded only to two representatives in favour of and to two opposing such limits, after which the motion shall be immediately put to the vote. In any event, the limitations specified in rule 21 shall be observed, and the President shall limit each intervention on a procedural question to a maximum of five minutes. When the debate is limited and a speaker exceeds the allocated time, the President shall call the speaker to order without delay.

Precedence

Rule 18

The Chairman or the presiding officer of a subsidiary body may be accorded precedence for the purpose of explaining the conclusions arrived at by that subsidiary body.

Points of order

Rule 19

Subject to rule 36, a representative may at any time raise a point of order, which shall be decided immediately by the President in accordance with these rules. A representative may appeal against the ruling of the President. The appeal shall be put to the vote immediately, and the President's ruling shall stand unless overruled by a majority of the representatives present and voting. A representative may not, in raising a point of order, speak on the substance of the matter under discussion.

Closing of list of speakers

Rule 20

During the course of a debate, the President may announce the list of speakers and, with the consent of the Conference, declare the list closed.

When there are no more speakers, the President shall, with the consent of the Conference, declare the debate closed. Such closure shall have the same effect as closure pursuant to rule 23.

Right of reply

Rule 21

1. Notwithstanding rule 20, the President shall accord the right of reply to the delegation of any State participating in the Conference that requests it. Other delegations may be granted the opportunity to make a reply.

2. Replies made pursuant to the present rule:

(a) Shall be made at the end of the last meeting of the day, or at the conclusion of the consideration of the relevant item if that is sooner;

(b) Shall be limited to two per item for any delegation at a given meeting, the first of which is not to exceed five minutes and the second three minutes.

Adjournment of debate

Rule 22

A representative may at any time move a motion for the adjournment of the debate on the question under discussion. Permission to speak on the motion shall be accorded only to two representatives in favour of and two opposing the adjournment, after which the motion shall, subject to rule 25, be immediately put to the vote.

Closure of debate

Rule 23

A representative may at any time move a motion for the closure of the debate on the question under discussion, whether or not any other representative has signified his wish to speak. Permission to speak on the motion for the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall, subject to rule 25, be immediately put to the vote.

Suspension or adjournment of the meeting

Rule 24

Subject to rule 36, a representative may at any time move a motion for the suspension or the adjournment of the meeting. No discussion on such a motion shall be permitted and it shall, subject to rule 25, be immediately put to the vote.

Order of motions

Rule 25

Subject to rule 19, the motions indicated below shall have precedence in the following order over all proposals or other motions before the Conference:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate on the question under discussion;
- (d) To close the debate on the question under discussion.

Proposals

Rule 26

1. The basic proposals for consideration by the Conference shall be those submitted, pursuant to section G, paragraph 6, of the Set, by the Intergovernmental Group of Experts on Restrictive Business Practices for the improvement and further development of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

2. Other proposals shall be those submitted at the Conference, in accordance with rule 27.

Other proposals and substantive amendments

Rule 27

Other proposals and substantive amendments shall normally be submitted in writing to the Secretary of the Conference, who shall circulate copies to all delegations, in the languages of the Conference. As a general rule, no proposal shall be discussed or put to the vote at any meeting of the Conference, unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President may, however, permit the discussion and consideration of amendments, even though these amendments have not been circulated, or have only been circulated the same day.

Decisions on competence

Rule 28

Subject to rule 19, any motion calling for a decision on the competence of the Conference to consider any matter, or to adopt a proposal, or an amendment submitted to it, shall be put to the vote before the matter is considered or a vote is taken on the proposal or amendment in question.

Withdrawal of proposals and motions

Rule 29

A proposal or a motion may be withdrawn by its sponsor, at any time before voting on it has commenced, provided that it has not been amended by decision of the Conference. A proposal or a motion thus withdrawn may be reintroduced by any representative with its original priority, provided he does so promptly and it has not been substantially changed.

Consideration of programme budget implications

Rule 30

Before the Conference takes a decision or makes a recommendation, the implementation of which might have programme budget implications for the United Nations, it shall receive and consider a report from the secretariat on such implications.

Reconsideration of proposals

Rule 31

When a proposal has been adopted or rejected, it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission to speak on the motion to reconsider shall be accorded only to two speakers opposing the motion, after which it shall be put to the vote immediately.

Chapter V

DECISION-MAKING

Consensus

Rule 32

1. The Conference shall endeavour to ensure that all its substantive decisions are taken by consensus.
2. Notwithstanding any measures that may be taken in compliance with paragraph 1, a proposal before the Conference shall be voted on if a representative so requests.

Voting rights

Rule 33

Each State participating in the Conference shall have one vote.

Majority required

Rule 34

1. Subject to paragraph 1 of rule 32, decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the representatives present and voting.
2. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.
3. If the question arises whether a matter is one of procedure or of substance, it shall be decided by the Conference by a majority of the representatives present and voting.
4. If the vote is equally divided on a decision requiring a majority of the representatives present and voting, the proposal or motion shall be regarded as rejected.
5. For the purpose of these rules, the phrase "representatives present and voting" means representatives present and casting an affirmative or negative vote. Representatives who abstain from voting shall be considered as not voting.

Method of voting

Rule 35

1. Except as provided in rule 42, the Conference shall normally vote by show of hands, but any representative may request a roll-call, which shall then be taken in the French alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President. The name of each such State shall be called in all roll-calls, and its representative shall reply "yes", "no" or "abstention".
2. The vote of each State participating in a roll-call shall be inserted in any record of or report of the Conference.

Conduct during voting

Rule 36

After the President has announced the commencement of a vote, the voting shall not be interrupted until the result of the vote has been announced, except on a point of order in connection with the process of voting.

Explanation of vote or position

Rule 37

1. Representatives may make brief statements consisting solely of explanations of vote, before the voting has commenced, or after the voting has

been completed. The President may limit the time to be allowed for such explanations. The representative of a State sponsoring a proposal or motion shall not speak in explanation of vote thereon, unless it has been amended.

2. When the same matter is considered successively in several organs of the Conference, the representatives of States should, as far as possible, explain their votes in one such organ, unless these votes differ.

3. Similarly, explanatory statements of position may be made in connection with a decision taken without a vote.

Division of proposals

Rule 38

A representative may move that parts of a proposal shall be voted on separately. If a representative objects, the motion for division shall be voted upon. Permission to speak on the motion shall be accorded only to two representatives in favour of and two opposing the division. If the motion for division is carried, those parts of the proposal which are subsequently approved shall be put to the vote as a whole. If all operative parts of the proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

Amendments

Rule 39

A proposal is considered an amendment to another proposal if it merely adds to, deletes from or revises part of that proposal. Unless specified otherwise, the word "proposal" in these rules shall be considered as including amendments.

Order of voting on amendments

Rule 40

1. When an amendment is moved to a proposal, the amendment shall be voted on first. When two or more amendments are moved to a proposal, the Conference shall vote first on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom, and so on, until all the amendments have been put to the vote. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon.

2. When the Conference decides, in accordance with rule 38, to consider an extensive text in convenient portions (such as paragraphs or articles), each of these shall be treated as a separate proposal for the purpose of paragraph 1.

Order of voting on proposals

Rule 41

1. If two or more proposals, other than amendments, relate to the same question, they shall, unless the Conference decides otherwise, be voted on in the order in which they were submitted. The Conference may, after each vote on a proposal, decide whether to vote on the next proposal.
2. Revised proposals shall be voted on in the order in which the original proposals were submitted, unless the revision substantially departs from the original proposal. In that case, the original proposal shall be considered as withdrawn and the revised proposal shall be treated as a new proposal.
3. A motion requiring that no decision be taken on a proposal shall have priority over that proposal.

Elections

Rule 42

1. All elections shall be held by secret ballot unless, in the absence of any objection, the Conference decides to proceed without taking a ballot on an agreed candidate or slate of candidates.
2. When candidates are to be nominated, each nomination shall be made by only one representative, after which the Conference shall immediately proceed to the election.

Balloting

Rule 43

1. When one or more elective places are to be filled at one time under the same conditions, each delegation entitled to vote may cast a vote for as many candidates as there are places to be filled, and those candidates, in a number not exceeding the number of such places, who obtain in the first ballot a majority of the votes cast and the largest number of votes shall be elected.
2. If the number of candidates so elected is less than the number of places to be filled, additional ballots shall be held to fill the remaining places. From such ballots the candidates obtaining the least number of votes in the previous ballot may be eliminated on the proposal of the President.

Chapter VI

SUBSIDIARY BODIES

Negotiating Group and subsidiary bodies

Rule 44

1. The Conference shall establish a Negotiating Group.
2. The Conference may establish such other subsidiary bodies as it deems necessary.

Officers

Rule 45

The President of the Conference, in addition to the duties described elsewhere in these rules, shall be the Chairman of the Negotiating Group. Other subsidiary bodies shall elect their own officers as may be required.

Applicable rules

Rule 46

The rules contained in chapters II, III, IV, V and X shall be applicable, mutatis mutandis, to the proceedings of subsidiary bodies, except as these may otherwise provide and except that:

- (a) The Chairman of a subsidiary body other than the Negotiating Group may exercise the right to vote;
- (b) The Chairman of the Negotiating Group or of another subsidiary body may declare a meeting open and permit the debate to proceed when representatives of at least one quarter of the States participating in the Conference are present. The Chairman of any subsidiary body of limited membership may do so when representatives of a majority of its members are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken.
- (c) Decisions of subsidiary bodies shall be taken by a majority of the representatives present and voting.

Chapter VII

LANGUAGES

Languages of the Conference

Rule 47

Arabic, Chinese, English, French, Russian and Spanish shall be the languages of the Conference.

Interpretation

Rule 48

1. Speeches made in a language of the Conference shall be interpreted into the other languages of the Conference.
2. A representative may speak in a language other than a language of the Conference. In this case the delegation concerned shall provide for interpretation into one of the languages of the Conference. Interpretation into the other languages of the Conference by the interpreters of the secretariat may be based on the interpretation given in the first such language.

Languages of official documents

Rule 49

Official documents shall be made available in the languages of the Conference.

Chapter VIII

RECORDS AND REPORTS

Records of meetings

Rule 50

1. There shall be neither verbatim nor summary records of meetings.
2. Statements made at the Conference shall not be reproduced in extenso either as separate documents or as an integral part of or attached to any report of a subsidiary body or of the Conference, unless, in exceptional cases, they are of a technical nature and served or are to serve as bases for discussion, and a decision to reproduce them has been taken by the Conference or the body concerned.

Sound recordings

Rule 51

Sound recordings of plenary meetings of the Conference, of the meetings of the Negotiating Group and of any other subsidiary bodies, as appropriate, shall be made and kept in accordance with the practice of the United Nations.

Report or Final Act of the Conference

Rule 52

1. The Conference may recommend to the General Assembly the adoption of amendments to the Set of Principles and Rules. The Conference may, if it so decides, approve and open for signature a Final Act. The Conference shall,

subject to the provisions of rule 50, paragraph 2, adopt a report on its proceedings. The draft of such report shall be prepared by the Rapporteur of the Conference, who may be assisted by "friends" designated by regional groups.

2. The draft of any Final Act shall be prepared by the secretariat and submitted by it, through the President, to the Conference.

Chapter IX

PUBLIC AND PRIVATE MEETINGS

Plenary

Rule 53

The plenary meetings of the Conference shall be held in public unless the Conference decides otherwise.

Subsidiary bodies

Rule 54

Meetings of subsidiary bodies shall be held in private, unless the Conference or the subsidiary body concerned decides otherwise.

Communiqués on private meetings

Rule 55

At the close of a private meeting, the Conference or the subsidiary body concerned may issue a communiqué to the press through the secretariat of the Conference.

Chapter X

OTHER PARTICIPANTS AND OBSERVERS

Representatives of organizations that have received a standing invitation from the General Assembly to participate in the capacity of observers in the sessions and work of all international conferences convened under its auspices

Rule 56

Representatives designated by organizations that have received a standing invitation from the General Assembly to participate in the sessions and work of all international conferences convened under its auspices have the right to participate as observers, without the right to vote, in the deliberations of the Conference, and, as appropriate, its subsidiary bodies.

Representatives of national liberation movements

Rule 57

Representatives designated by national liberation movements invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference and, as appropriate, its subsidiary bodies, on any matter of particular concern to those movements.

Representatives of the specialized and related agencies */

Rule 58

Representatives designated by the specialized and related agencies may participate as observers, without the right to vote, in the deliberations of the Conference and, as appropriate, its subsidiary bodies, on questions within the scope of their activities.

Representatives of other intergovernmental organizations

Rule 59

Representatives designated by other intergovernmental organizations invited to the Conference, may participate as observers, without the right to vote, in the deliberations of the Conference and, as appropriate, its subsidiary bodies, on questions within the scope of their activities.

Representatives of interested United Nations organs

Rule 60

Representatives designated by interested organs of the United Nations may participate as observers, without the right to vote, in the deliberations of the Conference and, as appropriate, its subsidiary bodies, on questions within the scope of their activities.

Representatives of non-governmental organizations

Rule 61

1. Non-governmental organizations invited to the Conference may designate representatives to sit as observers at public meetings of the Conference.

2. Upon the invitation of the presiding officer of the Conference body concerned, and subject to the approval of that body, such observers may make oral statements on questions in which they have a special competence.

*/ Related agencies means other organizations that have a relationship agreement or an established relationship with the United Nations, such as the International Atomic Energy Agency, the World Tourism Organization and the General Agreement on Tariffs and Trade.

Written statements

Rule 62

Written statements related to the work of the Conference, submitted by the designated representatives or observers referred to in rules 56 to 61, shall be distributed by the secretariat to all delegations in the quantities and in the languages in which the statements are made available to the secretariat for distribution, provided that a statement submitted on behalf of a non-governmental organization is on a subject in which it has a special competence and is related to the work of the Conference.

Chapter XI

AMENDMENT AND SUSPENSION OF THE RULES OF PROCEDURE

Method of amendment

Rule 63

These rules may be amended by a decision of the Conference, taken by a two-thirds majority of the representatives present and voting.

Method of suspension

Rule 64

Any of these rules may be suspended by a decision of the Conference, provided that 24 hours' notice of the proposal for suspension has been given, which may be waived if no representative objects; subsidiary bodies may by unanimous consent waive rules pertaining to them. Any suspension shall be limited to a specific and stated purpose, and to the period required to achieve it.

Other procedural matters

Rule 65

Any procedural matter not covered by these rules shall be settled in accordance with the rules and practices of the General Assembly.
